A-1.

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2003-0239, Clement A.St.Hilaire v. Jeff Bryan Remodeling, Inc.The court on June 6, 2003,Issue ed the Following Order:

Notice of appeal is declined. See Rule 7 (1) The notice of appeal and any documents that were filed this matter matter were provided to each justice whose name appears below.

Under Supreme Court Rule 7,the supreme court may in its discretion decline to accept appeal from the superior, district, or probate court or from the family division. Noappeal, however, is declined except by unanimous vote of the court with at least three justices participating.

No justice who considered this matter voted to acxcept this appeal. Accordingly, the appeal was declined. If any justice who considered this matter believed the appeal should have been accepted, this case would have been scheduled for briefing.

Declined.

Brock, C.J., and Broderick, Nadeau, Dalianis and Duggan, jj. concurred.

Eileen Fox,
Clerk.

Distribution:
Clerk, Rockingham County Superior Court 01-C-941
Mr. Clement A.St.Hilaire
Karon W. Oliver, esquire
Hon. Philip S. Hollman
Hon. Kenneth R. McHugh
Laura Mitchell, Supreme Court.
File

# THE STATE OF NEW HAMPSHIRE

## SUPREME COURT

In Case No. 2003-0239, Clement A.St.Hilaire v. Ieff Bryan Rmodeling, Inc. The Court on July 24, 2003, issued the following order:

Plaintiff's motion for reconsideration is denied.

Reconsideration denied.

Brock, C.J. and Broderick, Nadeau, Nalianis and duggan, Jj. concurred.

Eileen Fox.
Clerk

Distribution:
Clerk, Rockingham County Superior Court 01-C-941
Hon. Philip S. Hollman
Hon. Kenneth R. Mchugh
Mr. Clement A.St.Hilaire
Karon W. Oliver, Esquire
Donna R. Craig, Supreme Court
Laura Mitchell, Supreme Court
File

A-3.

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM,ss. SUPERIOR COURT

Clement A.St.Hilaire

v.

Jeff Bryan Remodeling, Inc.

01-C-0941

Order

This order addresses defendant's motion to dismiss plaintff 's claim for real estate commission as well as other matters described below. On November 8, 2001, plaintiff, ClementA. St.Hilaire, brought a small claim complaint in Exeter District Court to recover $ 2,500.00 from the Defendant, apparently for breach of Contract. Underlying this district court compla int was plaintiff's expectation that he would get a broker's commission for producing defendant as the buyer of certain real estate in North Hampton and Stratham, New Hampshi- re Hampshire that was owned by the estate of Maxwell Sher burne of which the executor was Alan Sherburne (hereinafter "Sherburne")

In February 2000, defendant entered into a purchase and sale agreement ("PSA") with Sherburne to buy the real estate which was listed for sale under an exclusive listing contract between Sherburne and Plaintiff. The PSA expreely provided that it was "conditioned on the {P}urchaser's [(defendant's)] ability to access [the] land through [a] [r]ight-of-[w]ay...men tioned"in the PSA.Under the PSA, the closing was originally to take place in Maech 2000, In late February 2000,Sherburn- e and defendant agreed to extend the closing date to mid- April 2000 so to afford the parties more time to obtain the right-of-way for defendant as required by the condition in the PSA. However, in mid-April 2000,Sherburne and defend ant both ageed to cancel the PSA because the condition rega- rding the right-of way could not be fulfilled by that time.

Plaintiff subsequently sued Sherburne in this court for the $10,000 Commission he expected to receive. However, the court granted Sherburne's motion to dismiss Plaintiff's suit on March 9, 2001, ruling that plaintiff had failed to state a legally recognizable cause of action. In so ruling, the Court stated:

In this case, the buyer was not ready, willing and able tp purchase the property because of a condition which was acceptable to the seller,...and the refore the broker... is not entitled to the commision.

It was after dismissal of his suit against Sherburne that plaintiff filed his small claim complaint against defendant in the Exeter District Court.

The Exeter District Court transferred Plaintiff's suit to this court for jury trial upon defendant's request for removal.upon the transfer,defendant filed a counterclaim against Plaintiff, alleging that pursuant to his PSA with Sherburne defend ant had provided a $ 5,000.00 deposit earnest money which plaintiff was holding as escrow agent and that plaintiff had refused to return these funds to defendant even through deffendant and Sherburne had cancelled the PSA for failure of the condition relating to the right-of -way.Defendant's count erclaim is predicated upon coversion,violation of RSA 331-A :13, IV and: 26, VII, unjust enrichment and violation of RSA 358- A. In addition to requesting damages for Plaintiff's refu sal to return the $ 5,000.00 deposit, defendant seeks enhanc ed compensatory damages for Plaintiff's bad faith,multiple damages under RSA-358-A and an award of Attorney'sfees.

Defendant has now Moved to dismiss plaintiff's claim on several grounds, including (1) that plaintiff's complaint is unintelligible and fails, to state a cause of action, for which plaintiff may obtain relief and(2)that plaintiff is barred from proceeding with his claim on account of the March 9, 2001or der of this court and an order of the New Hampshire Real Estate Commission ("Commission") of October 23, 2001.the Order of the Commission resulted from a hearing on a compl aint by Jeffrey Bryan against plaintiff for violations of RSA. 331-A:13. IV and Vi, and:26, IV,VII, XIII,and XXIX, andNew Hampshire Code of Administrative Rules, Rea 701.01(i) and 702.01 (b).

The Commission found that although defendant had expen ded considerable time, money and effort in attempting to get the right- of -way and had engaged both a surveyor and law er for that purpose, he could not get the easement necessary to access the property he had agreed to buy. The Commission further found that because trhe condition of the PSA conc rning the right-of-way could not be met,Sherburne and defendant mutually released each other from the PSA and author-

ized plaintiff to return the $5,000.00 escrow deposit to defendant. Finally, the commission found that plaintiff had violated the provisions of RSA 331-A:13, IV and :26. VII by not returning the $ 5,000.00 to defendant within thirty day from from the date he received the signed releases from Sherburne and Defendant.

The Commission ordered that plaintiff provide it with proof that he had returned the $ 5,000.00 escrow deposit to defendant within thirty days of the date of its order. It also suspended plaintiff's real estate License until plaintiff returned the deposit to Defendant. Moreover, The Commission warned plaintiff that if he failed to return the Deposit as ordered, he could face additional penalties, including revovocation of his license, claim against his real estate escrow account bond bond, and criminal prosecution.

Plaintiff's pleadings are a conglomeration of words making little if any sense. They are replete with malaprops and nons quiturs, making the Court's task in understanding plaintiff's theories an unusallly difficult one. Moreover, Plaintiff's presentation at hearing added no particular clarity to Plaintiff's theory of recovery. As best as the court can determine,Plaintiff would now like to amend his suit to recover the full $ 10,000.00 Commission from defendant which plaintiff would have earned from Sherburne had the Sale been finalized. Plaintiff view his right to this recovery as arising either from a contractual relationship between himself and Defend ant or from a sort of third party beneficiary right resulting from the PSA between Sherburne and defendant. In Fact,asa Matter of Law, Plaintiff has no contractual relationship with defendant arising from the PSA or any other source.

Nor was the PSA between Sherburne. Plaintiff has failed to State a legally recognized case of action against defendant, and defendants motion to dismiss plaintiff's suit is therefore Granted. Another basis for this dismissal is that plaintiff is barred under the doctrine of res-judicata from relitigating the question of his entitlement to real estate Commission from defendant. This was the vary issue decided against plaintiff in the proceeding between plaintiff and defendant before the commission See Farm Fam. Mut. Ins. Co. Peck. 143 N.H.603, 605 (1999)

Under the undisputed facts of this case, it is outrageous that plaintiff has brought suit against defendant for real esta

te commission and has refused to return the $ 5,000.00 depo sit that defendant placed with plaintiff in escrow. When litig ation is instituted through a party's bad faith conduct, when when a party is forced to litigate against an opponent whose position is patently unreasonable, it is appropriate for the court to award attorney's fees to the abused party. 143 N.H. 172, 175-76 (1998). "A party pursues a claim in bad faith if the claim is frivolous, " Kukene v. Genuable 145 N.H. 1, 3, (2000) (citation omitted),"A frivolous claim lacks any reasonable basis in the facts provable by evidence or any reasonable claim in the Law as it is,or as it might arguably be held to be. "ID. ( citation and Quotationa omitted). There is no ques tion but that plaintiff's claim for a real estate commission against defendant is Frivolous. Accordingly, defendant is aw arded his reasonable attorney's fees for defending against plaintiff's claim. If there is any dispute betweenthe parties as to the reasonableness of defendant's attorney's fees, hearing shall be scheduled on that issue at the request of either party

Since there is no basis in fact or in law for plaintiff's reten-retention of defendant's $ 5,000.00 deposit, the court. " *sua- sponte* " awards defendant a partial judgmeny in sum of $5,000.00 for the deposit. Several aspects of defend ant's claim remain for the Jury's determination. These are defendant's claim for Multiple damages, and attorney's fees and cost under RSA 358-A,the Consumer Protection Act. an defendant's Claim for enhanced Compensatory Damages.

So Ordered.

Dated February 8, 2002

"s./Philip S. Hollman"
Presiding Justice

A-7.-

# AMENDMENT TO THE CONTRACT

This Amendment dated on April 14, 2000 at 11:00 is to Amend the Contract dated for a closing on April 14, 2000.

The original Contract for the land in Stratham, New Hampshire and Recorded in Book 2057 page 434 and the adjoining land in North Hampton New Hampshire Recorded in Book 2036 page 461 at Rockingham County of New Hampshire County Court House.

The Above Conveyance is the exact owner-ship that the Late Maxwell Sherburne had in the Estate.

This Formal Request by Jeff Bryan of Stratham, New Hampshire is to set up a closing of conveyance within 10 Days.

Witness"s./ Timothy L.St.Hilaire " dated April 14,2000

Witness "s./ Jeff Bryan",

Witness " s./ Clement A.St.Hilaire "

Witness"s./Alan Sherburne"

Fax Mach. on Alan.

A-8.

## EXCLUSIVE RIGHT TO SELL MARKETING AGREEMENT

Date Listed April 5, 2000, Address Map15 Lot 29 North Hampton Map 2,lot 37 Stratham N.H. City/North Hampton and Stratham,N.H.County:Rockingham State New Hampshir e, Owner Alan A. Sherburne Ex.Registry of deed Book 2036 Page 464 ,Book 2057 Page 434, Owner Phone 978-851-7223 Listing Broker Clement A.St.Hilaire Lot Size 12 acres Date Listed 4/5,2000 type land Exclusive for 12 Months, Expiration April 5,2001.Listed Price 100,000, Property type

**Inquiries;** I/We will refer all inquiries or offers in respect to the sale or exchange of subject property to St.Hilaire Agency, hereafter refered to as St.Hilaire.

**Showing:** I/We will permit the property to be shown at reasonable times by appointment and without appointment during period of our absence.I/we authorize the use of a Key Box to facilitate single Broker Showing

**St.Hilaire Agency has the Exclusive rights to inspect the Leased property Listed "interior" or the "exterior".**

**Escrow:** St.Hilaire is authorized to collect and hold any fund deposited to secure the obligations of any buyer. In The event of a deposit dispute, at its sole discretion, St.Hilaire Agency may continue to hold such escrow funds until the dispute is resolved or parties appoint a mutually agreed upon escrow agent.

**Agency:** I/We have received The written Agency Disclosure. St.Hilaire will use reasonable efforts to procure aprospective purchaser including submission of this property to SubAgent s, and is authorized to share its marketing fee in order to facilitate cooperation with buyer representatives,seller Subagent s, disclosed dual agents and with Licensees engaged inAnoth er Relationship" except as noted below.

**Offers:** Once an offer has been accepted by the Seller in writting and a transaction is pending. St.Hilaire Agency has no further obligation to present offers to the Seller unless specifically requested to do so by the Seller.

**Fair Housing:**Properties Shall be shown and made available to buyers without regard to race, color, religion, sex, handicap,familial Status or national orgin as well as all class protected by the law of the United States, the applicable State and other applicable jurisdictions.

**I,(do) (do not) authorized Buyer Representation :** I/ We authorize St.Hilaire Agency to cooperate with and share its Fee with buyer representatives from St.Hilaire and other firm who represent the interests of the buyer. **I/We make this cho ice with the full understaning that the possibility of Disclosed Dual Agency exists anconsent that St.Hilaire mayact in a Disclosed Dual Agency capacity in accordance with the following: I, (do) (do not) authorize disclosed Dual Agency:** (Limited Duties): Licensees from St.Hilaire Agency and other firms may represent the interests of both the buyer and the seller in the same transaction, but only with the full know ledge and informed, written consent of both buyer and seller.When St.Hilaire Agency represents both buyer and sell er. there is a limitation on St.Hilaire Agency ability to fully represent both parties. For example, information obtained within confidentiality and trust of the fiduciary relationship with one party must not be disclosed to the other party with out prior written consent of the party adversely affected by the disclosure.Disclosed dual agents cannot advise,advocate negotiate on behalf of either party.should buyer client of any licensee show interest in the property,prior to considering an offer to purchase,I,/We will be notified that the that licensee is actingas a Disclosed Dual Agent in negotiations as to that specific prospective buyer.

**I,(do) (do not) authorize Sub-Agency:** I/ We Authorize St. Hilaire Agency to engage other Real Estate Licensees to coop erate with other firms who do not represent the interests of either the buyer or seller and therefore cannot advise,advoca advocate or negotiate on behalf of either party.

**Contingency:**Information regarding the above stated property which has been provided by the seller or public information obtained by St.Hilaire Agency may be disclosed to propprospective buyers and other real estate licensees and may be included in all marketing distributions. I/ We, The Seller{s} agree that any written or verbal information provided by me me/us about this property is correct and true and agree hold hold St.Hilaire andits SubAgents harmless from any liability or damagearising out of incorrect or undisclosed information

**Note: Seller acknowledges St.Hilaire Agency advise to seek legal counsel relating to any terms of this agreement which are not understood and hereby Acknowledges reciept of a copy of this Agreement.**

Date April 5, 2000,I, hereby authorize you Clement A.Hilaire to procure purchase of my property situated Map 15, Lot 29 Hampton Map 2 Lot 37 Stratham, New Hampshire at the price $100,000.00 for 12 months from this date terminating at 11:59 PM. on April 5, 2000,with the understanding that if the property is sold during this time, you shall receive aCommission of 10% percent for the Sale of the property by whom whom soever sold,and this agreement shall hold good Whether the property issold at the Above price,or at a lower price which may be accepted to me. I,HEREBY AGREE TO GIVE YOU THE EXCLUSIVE RIGHTS OF SALE .

**This Document has authorized to accept all earnest money deposits and to place them in a special trust account as provided by law.** This Document authorizes in prep aring a closing to acquire and Release a Financial loan close out balance. **I,(do) (do not) authorize** you to place a sign on said property. **I,(do) (do not) authorize**you to advertise the property.

A COPY OF THE CONTRACT IS TO BE RECEIVED BY ALL PARTIES AND BY SIGNATURE: RECEIPT OF A COPY IS HEREBY ACKNOWLEDGE.

Wit "s/Clement A St.Hilaire" Date April 5,2000

Wit "s/ Alan A.Sherburne " Date April 5,2000

-A11.-

**PROPOSED RELEASE UNATTESTED**

June 7, 2000

The St.Hilaire Agency
Clem and Tim St. Hilaire
P,O, Box 592
Stratham, N.H. 03885

Re; Sherburne, et al to Jeff Bryan Remodeling, Inc.

Dear Messrs. St.Hilaire

This is to advise you that Jeff Bryan Remodeling, Inc. has rightfully rescinded the purchase and Sale Agreement due to his inability to obtain access to the property in the maner called for in the Purchase and sale Agreement.

I, Have informed Jeff Bryan Remodeling, Inc. that return of the $ 5,000.deposit, which you hold in escrow, is approved. As Seller, I, hereby instruct you to immediatly return the 5,000 deposit to Jeff Bryan Remodeling Inc.

Very Truly Yours

**(Unsigned)**

*Alan A Sherburne*

New Hampshire Real Estate Commission.

cc. Scott Lapoint, Esq.
R. timothy Pheonix, Esquire